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APPELLEE'S BRIEF

3441

SUPREME COURT OF KENTUCKY

File No. 76-5

EUGENE WEBB - - - - - Appellant

versus

COLONIAL COAL COMPANY and
WORKMEN'S COMPENSATION BOARD - Appellees

APPEAL FROM THE FLOYD CIRCUIT COURT
HON. HOLLIE CONLEY, JUDGE

BRIEF FOR APPELLEE, COLONIAL
COAL COMPANY

FILED
FEB 17 1976
MARTHA LAYNE COLLINS
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SUPREME COURT

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This ~~supreme~~ certify that true copies of the within Brief have been served upon the Hon. G. C. Perry, III, 82 Main Street, Paintsville, Kentucky 41240, Attorney for Appellant; Workmen's Compensation Board, Department of Labor, Frankfort, Kentucky 40601; and Hon. Hollie Conley, Judge, Floyd Circuit Court, Floyd County Courthouse, Prestonsburg, Kentucky 41653, pursuant to RCA 1.250.

This the ~~13th~~ day of February, 1976.

D. B. Kaze

Counsel for Appellee

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THE STATEMENT OF THE QUESTION PRESENTED

Does the Circuit Court have the authority to Remand a decision of the Workmen's Compensation Board back to the board with directions to appoint a disinterested physician in accordance with KRS 342.285 and KRS 342.315?

SUPREME COURT OF KENTUCKY

File No. 76-5

EUGENE WEBB - - - - - *Appellant*

v.

**COLONIAL COAL COMPANY and
WORKMEN'S COMPENSATION BOARD** - - *Appellees*

**APPEAL FROM THE FLOYD CIRCUIT COURT
HON. HOLLIE CONLEY, JUDGE**

BRIEF FOR APPELLEE, COLONIAL COAL COMPANY

May it please the Court:

STATEMENT OF THE CASE

The Appellant, Eugene Webb, filed a claim with the Workmen's Compensation Board alleging a work related injury occurring on April 5, 1974. The testimony revealed that while working in a coal hopper a quantity of coal was dumped into the hopper which struck him on the left shin and foot. Mr. Webb was treated initially for his injuries by Dr. Spurlock, who released him and returned him to work four days after his injury.

Mr. Webb did not return to work but instead filed this Workmen's Compensation claim. In an effort to substantiate his claimed disability, Mr. Webb was examined by Dr. Potter, Dr. Musgrave, and Dr. Allen, all of whom were called to testify in his behalf. Dr. Potter and Dr. Musgrave are both general practitioners and Dr. Allen, who is a psychiatrist, examined Mr. Webb in her first month of practice.

The Appellee, Colonial Coal Company, had the claimant examined by Dr. T. R. Miller, an orthopedic surgeon, of Lexington, Kentucky. Dr. Miller testified before the Board that this claimant did not have any orthopedic functional or vocational disability.

Workmen's Compensation Board entered an Opinion and Award wherein they made a "finding of fact" that Mr. Webb had sustained a traumatic neurosis, which has totally disabled him for an indeterminate period of time.

Appellee appealed this Award to the Floyd Circuit Court, which issued a Judgment remanding the case back to the Workmen's Compensation Board with directions that an independent physician be appointed to examine the claimant and make a report to the Board.

Appellant now appeals from the Judgment of the Floyd Circuit Court.

ARGUMENT

The Circuit Court Has the Authority to Remand a Decision of the Workmen's Compensation Board, Back to the Board With Directions to Appoint a Disinterested Physician in Accordance With KRS 342.285 and KRS 342.315.

The Floyd Circuit Court has the authority within the scope of review set out in KRS 342.285(3) and (4) to review the decisions of the Workmen's Compensation Board. In the cases, as in the case at bar, that the Circuit Court determines that the Board has acted in excess of its power, rendered an Award not in conformity with the provisions of the chapter, rendered an Award which is clearly erroneous on the basis of the reliable, probative, and material evidence of record, or the award is arbitrary, capricious, or characterized by an abuse of discretion, the Circuit Court has the authority to take affirmative action. Upon making a finding as outlined above, the affirmative action available to the Circuit Court is set out under KRS 342.285(4), which in part provides as follows:

“the Circuit Court shall enter judgment affirming, modifying or setting aside the order, decision or award, or in its discretion remanding the cause to the Board for further proceedings in conformity with the direction of the Court.”

It seems clear that the statutory scheme as outlined above grants the authority to Circuit Courts to remand cases back to the Workmen's Compensation Board in those instances where the Circuit Court believes the

Board to have exceeded its authority or out-stepped its bounds as set out in KRS 342.285(3)(a)(b)(c)(d) or (e). Certainly, in the instant case, the Floyd Circuit Court was not attempting to substitute its Judgment for that of the Board. Rather, it seems apparent that the Floyd Circuit Court was merely exercising its statutory right of review in remanding the case to the Board for further development of the facts necessary to make, and more importantly to substantiate, an Award of this type.

The authority of a Circuit Court to remand decisions of the Workmen's Compensation Board back to the Board for further proof where the facts are not satisfactorily developed is well established in Kentucky case law. *Broadway and 4th Avenue Realty Company v. Metcalf*, 20 S. W. 2d 988; *Kentucky Utilities Company v. Hammons*, 116 S. W. 2d 298; *Searcy v. Three Point Coal Company*, 134 S. W. 2d 228.

A Circuit Court also has authority to remand decisions of the Workmen's Compensation Board back to the Board where issues of fact are not properly developed to the extent that the Board's findings are not supported by probative evidence. *Clear Branch Mining Company v. Holbrook*, 247 S. W. 2d 48; *Old King Mining Company v. Messer*, 252 S. W. 2d 863.

The Opinion and Award of the Board in this action made a finding of fact that Mr. Webb had sustained a traumatic neurosis by reason of this accident and was totally disabled thereby for an indeterminate period of time. The only witness testifying before the Board specifically on this issue was Dr. Faye Allen. Dr.

Allen, a psychiatrist, had only been in practice for one month when she examined Mr. Webb. He was the first patient she had treated for a condition of this nature since graduation from school and beginning private practice.

Dr. Allen testified as to having made a diagnosis of Clinical depression rather than traumatic neurosis (Dr. Allen's deposition, pp. 5 & 10). In fact Dr. Allen stated that "Traumatic Neurosis" is really not even classified as a diagnostic category and further is not even listed in the A. P. A. Diagnostic Manual as a diagnostic category (Dr. Allen's deposition, p. 19).

There certainly can be no doubt that the Floyd Circuit Court has genuine grounds for remanding this case back to the Board for further development of proof. Dr. Allen's testimony is in direct conflict with the Opinion and Award of the Board. It is noteworthy that at page 14 of her deposition Dr. Allen was having great difficulty in commenting on what conditions were affecting Mr. Webb prior to his injury and whether or not he was affected by any condition or instability prior to his injury.

The action of the Floyd Circuit Court in remanding this case to the Board was a proper action in view of the fact that the Court has this authority, as set out in KRS 342.285(3) & (4). More importantly, the Court has not tried to substitute its Judgment for that of the Board but instead is requiring the Board to take further proof necessary to support an Opinion and Award of this nature. The remand with directions to the Board for appointment of a disinterested physician

seemed to the Floyd Circuit Court, and I might add to this writer, the most proper, and by far the simplest, manner of correcting the problem. The decision of the Floyd Circuit Court, which is squarely based on the prevailing Kentucky case law on statutory authority, and in the interest of fairness and justice to all parties, should be affirmed by this Court.

CONCLUSION

The Appellee, Colonial Coal Company, respectfully prays that the decision of the Floyd Circuit Court be affirmed.

Respectfully submitted,

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